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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of
Toll Free Service Access Codes

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CC Docket No. 95-155

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

REPLY COMMENTS OF TLDP COMMUNICATIONS, INC.

In its Notice of Proposed Rulemaking in the above-captioned proceeding ("Notice"), the Commission has appropriately recognized that toll free numbers in the United States "comprise a finite and very valuable public resource, one that satisfies an important business function and that is being used increasingly to meet consumers' personal needs." Notice at para. 1. Affirming this observation, numerous toll free customers, whose interests the Commission's rulemaking will most directly affect, have strongly supported the Commission's proposal to extend to current 800 number holders a Right of First Refusal for equivalent numbers in the 888 NPA, balanced with reasonable economic incentives to promote the efficient and equitable use of toll free numbers in the future. TLDP Communications, Inc. ("TLDP"), by its attorney, hereby reiterates its own support for these proposals, and replies to the comments of large Responsible Organizations ("RESPORGs"), including the Bell Operating Companies, who prefer to maintain the status quo.

I. An Unlimited Right of First Refusal is Consistent with the Public Interest and Commission Precedent

The Comments in this proceeding relating to the allocation of numbers in the new 888 NPA fall into two general categories: those which favor one or more of the solutions the Commission has proposed which attempt to "balance goodwill and the holder's interest in a vanity 800 number against the need to manage a limited resource," Notice, para. 35, and those which support maintaining the

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status quo approach of assigning numbers on a first-come, first served basis. Not surprisingly, Commenters who have urged the Commission to adopt one or more of the mechanisms proposed in the Notice have included nearly all existing toll free customers who have submitted Comments.¹ Most of these Commenters have singled out the Right of First Refusal as being the most equitable and efficient manner of allocating new NPA codes, and preferable to the other solutions proposed by the Commission. Commenters who favor retention of the status quo include nearly all local exchange carriers and RESPORGs.²

RESPORGs and other Commenters who oppose the Commission's allocation proposals, and the Right of First Refusal in particular, raise two principal arguments. As a legal matter, they argue, the creation of a Right of First Refusal is inconsistent with tariffs and case law which denies to

¹ Comments of General Services Administration; Comments of 800 Users Coalition, p. 14; Comments of American Car Rental Association, p. 4; Comments of 1-800-FLOWERS, p. 5; Comments of AVIS Rent A Car System, Inc. p. 6; Comments of Enterprise Rent A Car, Inc., p. 3; Comments of The Weather Channel, Inc., p. 3; Comments of Promoline, Inc., p. 6; Comments of Spiegel, Inc.; Comments of New Hair Institute; Comments of American Petroleum Institute, p. 4; Comments of Bass Pro Shops, p. 3; Comments of Crestar Bank; p. 1; Comments of Direct Marketing Association, p. 12; Comments of Charter Medical Corporation; Comments of NIMA International, p. 7; Comments of Aeronautical Radio, Inc., p. 4.

² See, e.g., Comments of BellSouth Telecommunications, Inc., at p. 15; Comments of GTE, p. 8; Comments of U S West Communications, Inc. p. 18; Comments of Southwestern Bell Telephone Company, p. 16; Comments of Ameritech, pp. 29 et seq.; Comments of Pacific Bell, p. 10; Comments of Bell Atlantic, p. 7; Comments of NYNEX, p. 7; Comments of Cable & Wireless, Inc., p. 4; Comments of Sprint Corporation, p. 20; Comments of the Competitive Telecommunications Association, p. 20; Comments of Telecommunications Resellers Association, p. 17. But see Comments of MCI Telecommunications Corporation, p. 15 ("the right of first refusal has the greatest potential for protecting the right of the 800 holder") and Comments of Telco Planning, Inc. at p. 5 ("Whether there is only one or six million vanity numbers, the Commission must protect the existing subscribers right of first refusal...Telco Planning vigorously supports the subscribers right of first refusal on a free of charge basis").

subscribers a proprietary interest in their telephone numbers.³ Opponents also contend that the creation of a Right of First Refusal is bad public policy because it will cause the rapid depletion of the 888 NPA, is inherently discriminatory and anti-competitive, and because it will foster customer confusion. Pacific Bell, p. 10; NYNEX, p. 7; Southern New England Telephone, p. 12; GTE, p. 9; US West, p. 19; Southwestern Bell, p. 17.

These arguments are all without merit. It is, of course, well settled that telephone companies do not own codes or numbers, but rather administer their distribution for the efficient operation of the public switched network. Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. (P&F) 1275, 1284 (1986). As the Commission has observed, moreover, no court has yet ruled on the legality of tariff provisions which grant to carriers exclusive property interests in particular blocks of numbers. Notice, para. 38.⁴ Conversely, the Commission has rejected tariff provisions denying to end users property rights to telephone number assignments on the ground that such provisions are "gratuitous" and "so broad and vague that it would accord the telco unrestricted discretion to change its customers' number assignments. Customers may have significant financial interests in the stability of these assignments." Investigation of Access/Divestiture Tariffs, 97 FCC2d 1082, 1158 (1984) (emphasis added).

Commission rulings that the administrative assignment of numbers do not "imply ownership

³ See, e.g., Comments of Pacific Bell, p. 14.

⁴ Case law on the more general proposition of whether a subscriber can assert a property interest in a telephone number is likewise evenly divided. *Security Investment Properties, Inc. v. Georgia Power Company*, 559 F.2d 1321, 1324 n. 1 (5th Cir. 1977).

by the entity to which it is assigned," Notice at n. 79, must be read against this background. Clearly, a telephone company may have a reasonable right to change number assignments against a customer's wishes if technical considerations so warrant. See, e.g., Investigation of Access/Divestiture Tariffs, supra. By the same token, however, under the Commission's number portability policies toll free subscribers may shift their numbers to new providers by dictating their choice to their RESPORG. As the Commission has recognized, moreover, subscribers may have a legitimate and substantial financial interest in preserving their number assignments which should be accommodated, absent compelling reasons to the contrary. Id. Creation of a Right of First Refusal to existing toll free subscribers is consistent with this long standing precedent.⁵

Opponents' public policy arguments are equally without foundation. In support of their effort to maintain the status quo system of assigning numbers on a first-come, first-served basis, Opponents have asserted that "the volume of numbers that might be tied up in such a process could be extremely high, raising the specter of rapid exhaustion of the 888 code." Pacific Bell Comments, p. 10. Opponents base this claim on a survey of RESPORGs performed by the SMS/800 Number Administration Committee ("SNAC") in July of this year. According to the results of this survey, responding RESPORGs currently provide services to 4.75 million "working 800 numbers", of which 24%, or 1.14 million, are "considered by [their] customers to be 'vanity' numbers and/or numbers which they have a vested interest in retaining." Comments of Alliance for Telecommunications Industry Solutions, Attachment B.

⁵ In analyzing the property rights of toll free subscribers to their numbers, the Commission should distinguish between customers who legitimately seek to protect their investment and good will in a given number, and those who merely seek to barter or speculate in numbers.

SNAC's projections are plainly meaningless. Although Opponents cite SNAC's numbers as an index of subscriber demand, SNAC distributed its survey to RESPORGs only, made no effort to poll 800 customers themselves, and developed no forms or procedures for surveying 800 users. Nor did SNAC require RESPORGs to explain how they had developed the data in their responses. Terms used in the questionnaire, such as "vanity numbers" and "replication", were not defined, and SNAC afforded RESPORGs only ten business days in which to submit their data. How many end users responding RESPORGs may have contacted during this short time frame is unknown.

It should also be noted that RESPORGs, who are predominantly carriers, are not disinterested players in this proceeding. Almost all have opposed the creation of a Right of First Refusal, arguing that it would deplete the 888 resource. Overestimating the number of users who would opt for a Right of First Refusal clearly bolsters their argument.

As TLDP and other parties have observed in their Comments, the true volume of vanity 888 numbers likely to be reserved by the holders of corresponding 800 numbers is relatively small. TLDP Comments, p. 3; Americas Carrier Telecommunications Association Comments, p. 17 ("there is a relatively small percentage of numbers that could be considered 'vanity' numbers"). By TLDP's calculations, applying simple mathematical principles, the number of seven digit vanity numbers which spell something is less than 10% of all numbers available. Inclusion of other repetitive number combinations which may also qualify as vanity numbers is not likely to alter this percentage significantly. In contrast to SNAC, the 800 Users Coalition surveyed actual 800 number holders, and determined that only 6% of their numbers would be classified as "sensitive". Comments of 800

Users Coalition, pp. 15-17. Other data from the AT&T 800 Toll-Free Directory support this determination. Id. Based on the responses of actual 800 users, these findings are far more credible and reliable than the RESPORG-based data compiled by SNAC.

Opponents also allege that establishment of a Right of First Refusal would be inefficient, unfair, and unlawfully discriminatory. The fact of the matter is, however, quite the opposite. As TLDP and other Commenters have observed, the impending depletion of the 800 NPA came about as a result of the first-come, first-served regime which Opponents advocate. Perpetuating this system of allocation would only perpetuate the problems it has produced, and would be directly contrary to the entire goal of this rulemaking. As both TLDP and Arinc have argued, moreover, maintaining the status quo by denying a Right of First Refusal will not retard the exhaustion of 888 numbers, since anyone who wants to exercise a Right of First Refusal will reserve the same number as soon as the 888 code is opened. TLDP Comments, p. 2; Arinc Comments, p. 5. The only question is whether the corresponding 888 numbers will be assigned to the holders of the 800 numbers, or whether their competitors are going to have a chance at beating them out in the first hours that the 888 exchange is opened. A Right of First Refusal will only affect whether numbers are reserved before or after March 1, 1996; if users want to duplicate their 800 numbers, they will be reserved immediately after March 1, 1996, unless a competitor gets to them first.⁶

⁶ As Arinc has observed, a right of first refusal may actually reduce the depletion of numbers in other codes by precluding the speculation and rent-seeking that can be expected to occur. Arinc Comments, p. 5.

In defense of maintaining the status quo, some Opponents, like Bell Atlantic, recognize that speculation and other unscrupulous practices may arise under a first-come, first-served regime, but claim that trademark, unfair competition and other laws are adequate to protect the interests of users. Bell Atlantic Comments, p. 7. See also Allnet Comments, p. 9. As other Commenters have noted, however, current case law on the applicability of these legal principles to toll free numbers is by no means settled, and such legal remedies are, in any event, expensive and uncertain. If the Commission has an opportunity to fend off countless trademark and unfair competition actions, which would only further clog the federal courts, there should be a strong reason not to do so. The burden should be on defenders of the status quo to demonstrate that inaction is more beneficial than action, and there is no reason to believe that is the case.⁷

Contrary to Opponents, grant of a Right of First Refusal would also lessen consumer confusion, and the economic impact of misdialed numbers on subscribers, far more effectively and certainly than any public education campaign. Given the propensity of people to mix numbers, customers will inevitably dial the wrong service access codes when making toll free calls. This confusion factor will not only result in lost business opportunities, but will lead to increased costs through inflated inbound calling bills. As API has observed, neither AT&T, MCI, Sprint nor any other 800 service carrier has offered rebates or offsets for misdirected toll free inbound calls. API Comments, p. 3. A Right of First Refusal provides certainty and stability far more effectively.

⁷ TLDP also opposes the proposal by Qwest Communications to allow a Right of First Refusal only to trademarked numbers. As the Weather Channel and other commenters have noted, many numbers in which resources have been invested cannot be trademarked. Weather Channel Comments, pp. 8-9. Linkage of a Right of First Refusal to trademarks would be unreasonable and discriminatory under these circumstances.

Finally, the Commission should summarily reject proposals by various parties in this proceeding to impose a fee or other usage requirements to exercise of a Right of First Refusal.⁸ As many Commenters have observed, allowing only certain users a Right of First Refusal has the negative effect of unfairly discriminating against smaller carriers and customers. See, e.g., Cable & Wireless Comments, p. 3, and Comments of Service Merchandise, p. 2. Fee requirements, which some larger subscribers may be able to afford, would be burdensome and inequitable to many smaller holders who have already invested substantial resources to advertise their toll free numbers.⁹ By the same token, a vanity number is no less important to a small bed and breakfast, which many get only a few calls a month, than it is to a major hotel chain. The Commission should avoid these solutions which are inherently anti-competitive and unfair.¹⁰

⁸ Commenters have proposed one time fees ranging from \$1,000 to \$5000 and monthly charges as high as \$1,000. See Comments of ACTA, p. 18, Bass Pro Shops, p. 3, Scherers Communications, p. 15.

⁹ TLDP does not oppose the development of reasonable economic incentives to encourage partition of 800 services, as discussed in paragraph 46 of the Notice. See TLPD Comments, pp. 3-4.

¹⁰ TLDP further objects to two specific conditions proposed by US West and AT&T, respectively. US West proposes to impose to charge RESPORGs on the basis of the size of records, presumably passing this cost to the end user. US West Comments, pp. 5-6. This proposal is premised on the theory that charges for a 100,000 byte record should be significantly higher than those for a record of only 100 bytes. The cost of 100,000 bytes at current street prices, however, is only \$0.03 (for PC disks) (\$400/gigabyte, divided by 10,000). It would be preposterous to impose a charge based on the fact that one user is using \$0.03 (capital cost) more memory than another.

Equally arbitrary and self-serving is the proposal of AT&T to limit the Right of First Refusal to only 15% of a RESPORG's numbers, with the Right of First Refusal to be exercised by RESPORGs. This solution is obviously desirable to a large RESPORG like AT&T which has more working 800 numbers than any other carrier. AT&T neglects to consider, however, the interests of smaller RESPORGs, and, more importantly, of subscribers, with whom any Right of First Refusal properly lies.

II. Conclusion


For the reasons stated above, TLDP respectfully urges the Commission to permit 800 users to exercise a Right of First Refusal with respect to the opening of the 888 NPA, and to institute economic incentives to spur the voluntary partition of toll free NPAs between those customers who require an 800 number and those who do not.

As stated in its Initial Comments (pp. 3-4), TLDP supports the development of reasonable economic incentives to encourage partition of toll-free services. The imposition on 800 numbers of a monthly fee as low as \$2 or \$3 per month, which the carriers would undoubtedly pass on to consumers, would serve as a strong incentive for low volume users, such as residences and paging customers, to migrate to 888 or other toll-free exchanges, freeing up the 800 numbers for use by businesses which require them.

Respectfully submitted,

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November 20, 1995

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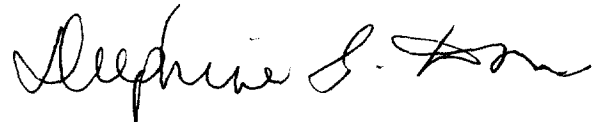
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A handwritten signature in black ink, appearing to read "Delphine I. Davis", written over a horizontal line.

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***By Hand**